SK Styrofoam Sdn Bhd v Pembinaan LCL Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–41 OF 2002

FAIZA TAMBY CHIK J

17 APRIL 2004

Arbitration — Award — Setting aside — Error of law on the face of award — Arbitration Act 1952 ss 23, 24

The applicant applied to set aside certain parts of the Final Award and to vary certain findings of the arbitrator. The applicant also sought to remit certain issues to the reconsideration of the arbitrator.

Held, allowing the application with costs:

(1) The arbitrator made observations indicating that he agreed with the main argument made by the respondent that the default notice of 25April 1998 was defective because it was not sent by registered post as required by cl 25 notwithstanding the fact that the notice was delivered by hand. In so finding, the arbitrator misdirected himself in law. The arbitrator's reasoning was irrational and perverse. If he had applied the correct law as stated in *Hill v London Borough of Camden* [1980] 18 BLR 35, the arbitrator would have found the default notice to be validly issued (see paras 7 and 11).

(2) The key issue was not how the notices were served as long as they were served. The court was of the view that the arbitrator fell into error when he ignored the entire line of cases on this point and the clear trend of the current day to take a business common sense approach. He fell into error when he rejected summarily the request to take such an approach. He followed the wrong law in taking a formalistic and mandatory approach to the procedural requirements of sending notices under the contract. The arbitrator was therefore wrong in concluding that the contractual determination by the applicant of the contract failed (see para 23).

(3) There was no question that the default notice had complied with the requirements of cl 25. The contractor knew clearly what was the default and the consequences of continuation for 14 days. The letter of determination clearly communicated the fact that the employer has determined the contract (see para 25).

(4) It was common ground that even if determination of the contract through contractual provisions fail, a common law right of determination was still available to the applicant. This was so because the courts have consistently held that common law rights can only be excluded by express terms to that effect. In any event, cl 25 was also qualified by the words 'without prejudice to any other rights or remedies' which clearly indicated a preservation of all common law rights of contractual termination (see paras 27 and 28).

(5) Nowhere in the authorities or in the textbook commentaries does one find the position taken by the arbitrator that failure to remove defective work was not a permissible reason for a common law determination (see para 29).

(6) In misconstruing the law in this way, the arbitrator has put himself in a position that he refuses to entertain the rival contentions of each party, refuses to analyze evidence and make a finding that the contention of the applicant that the respondent failed to remove defective work to the extent it became a fundamental breach of contract was made out. The Arbitrator had clearly misconducted the proceedings in this sense and had failed to discharge his duty as an arbitrator (see para 29).

(7) The correct question that ought to have been posed and answered by the arbitrator was, 'On the facts of the case, had the respondent wholly suspended work? If so, was it done because of physical impossibility or a hindrance to doing work'. The respondent has not shown any evidence of a physical impossibility or hindrance to justify suspension. The contract itself contemplated that the employer could determine the contract for a suspension of work without reasonable cause that continued for 14 days after a warning. Such conduct clearly was a breach that was sufficiently fundamental to justify the determination of the contract in common law. The determination of the contract by the applicant was valid in both contract and common law and therefore the determination by the arbitrator was set aside (see para 34).

[**Bahasa Malaysia summary**

Pemohon memohon untuk mengenepikan bahagian-bahagian tertentu dalam Award muktamad di samping memohon untuk mengubah keputusan tertentu penimbangtara. Pemohon juga memohon untuk meremitkan isu-isu tertentu untuk dipertimbangkan semula oleh penimbangtara.

Diputuskan, membenarkan permohonan dengan kos:

(1) Penimbangtara membuat pemerhatian mengatakan bahawa beliau bersetuju dengan hujah utama yang dibuat oleh responden bahawa notis ingkar bertarikh 25 April 1998 itu adalah cacat kerana ia tidak dikirimkan melalui pos berdaftar sebagaimana yang dikehendaki oleh kl 25 meskipun pada hakikatnya notis berkenaan telah dihantar serah dengan tangan. Dalam membuat keputusan sedemikian, penimbangtara telah menyalaharahkan dirinya dari segi undang-undang. Alasan yang dibuat oleh penimbangtara itu tidak rasional dan bertentangan. Jika beliau telah memakai undang-undang yang betul seperti yang dinyatakan dalam kes *Hill v London Borough of Camden* [1980] 18 BLR 85, sudah tentu penimbangtara akan mendapati bahawa notis ingkar berkenaan telah dikeluarkan dengan cara yang sah (lihat perenggan-perenggan 7 dan 11).

(2) Isu penting bukanlah tentang bagaimana notis tersebut disampaikan asalkan saja notis tersebut disampaikan. Mahkamah berpendapat bahawa penimbangtara telah melakukan kesilapan apabila beliau tidak

mengendahkan kes-kes tentang isu berkenaan dan tentang trend yang jelas yang ada pada masa ini untuk mengambil pendekatan berdasarkan akal budi perniagaan. Beliau melakukan kesilapan apabila beliau menolak secara terus permintaan untuk mengambil pendekatan sedemikian. Beliau mengikuti undang-undang yang salah apabila mengambil pendekatan yang formal dan mandatori walhal mengirimkan notis-notis di bawah kontrak itu merupakan kehendak prosedur. Oleh itu penimbangtara telah bertindak salah apabila membuat kesimpulan bahawa tindakan pemohon membuat penentuan kontraktual terhadap kontrak berkenaan gagal (lihat perenggan 23).

(3) Tidak wujud sebarang persoalan bahawa notis ingkar itu telah mematuhi kehendak kl 25. Kontraktor berkenaan tahu dengan jelas apa kemungkiran tersebut dan apa akibat tindakan menggantung kerja secara berterusan selama 14 hari. Surat penentuan itu dengan jelas menyampaikan hakikat bahawa majikan telah menentukan kontrak berkenaan (lihat perenggan 25).

(4) Ia merupakan alasan biasa bahawa meskipun penentuan kontrak menerusi peruntukan kontraktual itu gagal, pemohon masih mempunyai hak common law untuk membuat penentuan. Hal ini demikian kerana mahkamah-mahkamah telah secara konsisten membuat keputusan bahawa hak common law hanya boleh dikecualikan melalui terma nyata yang memberi kesan sebegitu. Walau bagaimanapun, kl 25 itu juga disyaratkan dengan perkataan 'without prejudice to any other rights or remedies' yang jelas menunjukkan suatu pengekalan semua hak common law tentang penentuan kontraktual (lihat perenggan-perenggan 27 dan 28).

(5) Tidak ditemui di mana-mana jua dalam autoriti atau dalam ulasan buku teks tentang kedudukan yang diambil oleh penimbangtara berkenaan yang mengatakan bahawa kegagalan mengalihkan kerja yang cacat itu bukan merupakan sebab yang dibenarkan bagi membuat penentuan di sisi common law (lihat perenggan 29).

(6) Dalam menyalahtafsirkan undang-undang dengan cara sebegini, penimbangtara telah meletakkan dirinya pada suatu kedudukan yang memperlihatkan keengganan beliau untuk melayani hujah saingan/tandingan dari setiap pihak, enggan menganalisis keterangan, dan membuat keputusan bahawa pemohon berjaya menegakkan hujah bahawa responden telah gagal mengalihkan kerja yang cacat itu dan bahawa kegagalan berkenaan membentuk kemungkiran asasi kontrak. Dari segi ini penimbangtara jelas telah salah kendali prosiding dan telah gagal untuk melaksanakan tugas dan tanggungjawab beliau sebagai seorang penimbangtara (lihat perenggan 29).

(7) Persoalan yang betul yang seharusnya ditanyakan dan dijawab oleh penimbangtara berkenaan ialah, 'On the facts of the case, had the respondent wholly suspended work? If so, was it done because of physical impossibility or a hindrance to doing work?' Responden tidak memperlihatkan sebarang keterangan tentang kemustahilan fizikal atau halangan untuk menjustifikasikan penggantungan kerja. Kontrak

itu sendiri membayangkan bahawa majikan boleh menentukan kontrak jika kerja digantung tanpa sebab yang munasabah dan berterusan selama 14 hari selepas sesuatu amaran. Perlakuan sedemikian jelas merupakan suatu kemungkiran yang menjadi asas yang memadai untuk menjustifikasikan penentuan kontrak di sisi common law. Tindakan pemohon menentukan kontrak adalah sah dari segi undang-undang kontrak dan juga dari segi common law dan oleh yang demikian penentuan yang dibuat oleh penimbangtara itu dengan ini diketepikan (lihat perenggan 34).]

Notes

For cases of setting aside arbitration awards, see 1 *Mallal's Digest* (2002 Reissue) paras 1202–1245.

For challenging the award, see 13 *Halbury's Laws of Malaysia* paras [220-121]–[220.135].

Cases referred to

Antaios Compania Naviera SA v Salem Rederierna AB [1985] AC 191 (refd)

Architectural Installation Services v James Gibbons Windows Ltd (1989) 46 BLR 91 (refd)

Belsfield Court Construction Co Ltd v Pywell [1970] 1 All ER 453 (refd)

Canterbury Pipe Lines v Christchurch Drainage (1979) 16 BLR 76 (refd)

Central Provident Fund Board v Ho Bock Kee [1981] 2 MLJ 162 (refd)

Chiam Tau Tze & Anor v The Sarawak Land Consolidation and Rehabilitation Authority and another case [1994] 3 CLJ 605 (refd)

DMCD Museum Associates Sdn Bhd v Shademaker (M) Sdn Bhd (2) [1999] 4 MLJ 243 (refd)

Delta Vale Properties Ltd v Mills & Others [1990] 1 WLR 445 (refd)

District Council & Wigley Fox Partnership 33 BLR 39(refd)

Ellis Tylin Ltd (known as Dalkia Technical Services Ltd) v Co-operative Retail Services Ltd (1999) BLR 205 (refd)

Eriksson v Whalley [(1971) 1 NSWLR 397 (refd)

Fairclough Building Ltd v Vale of Belvoir Superstore Ltd (1980) 28 CLR 1; 56 BLR 74 (refd)

Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] 6 MLJ 80 (refd)

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd 1 BLR 73 (refd)

Goodwin & Sons v Fawcett (1945) Estates Gazette 186 (refd)

Hill v London Borough of Camden (1980) 18 BLR 35 (refd)

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] All ER 98 (refd)

Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd [1997] 1 CLJ 448 (refd)

Kennedy v Collings Construction Company [1997] 7 B & CL 25 (refd)

London Borough of Merton v Leach Ltd [1982] 32 BLR 51 (refd)

Lubenham Fidelities & Investment Co Ltd v South Pembrokshire (refd)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 (refd)

Miramar Maritime Corp v Holborn Oil Trading Ltd [1984] All ER 326 (refd)

Yates Building Co Ltd v Pulleyn & Sons (York) Ltd 237 Estate Gazette 183 (refd)

Legislation referred to

Arbitration Act 1952 ss 23, 24(2)

R Sivarasa (CI Ser with him) (Ser & Co) for the applicant.
WA Lau (WA Lau & Partners) for the respondent.

Faiza Tamby Chik J:

[1] In this motion, the applicant seeks to invoke jurisdiction of this court pursuant to ss 23 and 24(2) of the Arbitration Act 1952 and prays for the following reliefs:

(i) in prayer 1(a) to (e) — to set aside some parts of the Final Award of the arbitrator made and published pursuant to an arbitration between the respondent (acting as the claimant in the arbitration) and the applicant (acting as the respondent in the arbitration) in connection with a building contact based on PAM's Form of Building Contract;

(ii) in prayers 2 and 3 it seeks an order to vary the Award and to make a declaration that determination of the contract by the applicant was lawful;

(iii) in prayer 4 — to remit issues in respect of the applicant's claim for loss of rental, extra costs and expenses incurred and loss of profit to the arbitrator;

(iv) in prayer 5 — to remit the issue of valuation of works executed or completed by the respondent but not previously certified to the arbitrator;

(v) in prayer 6 — it seeks an order to vary the finding of the arbitrator that the applicant is not entitled to certain discount;

(vi) in prayer 7 — it seeks an order to vary the finding of the arbitrator in respect of the amount due and unpaid on the interim certificates;

(vii) in prayer 8 — consequential order that the arbitrator make and publish a further Final Award.

[2] The motion is supported by the affidavit of Tan Yoke Soon affirmed on 26 April 2002 (encl 2). There is an affidavit in reply on behalf of the respondent affirmed by Low Chin Meng on 5 June 2002. I think the affidavit in reply does not raise any specific challenges to the facts set out in encl 2 but raises contentions of law in opposition to the motion. The motion seeks to have set aside parts of the Award set out in prayer 1(a) to (e). Prayers 2–8 of the motion set out consequential orders including remitting of part of the award in the event that this court is minded to grant the orders sought in prayer 1. The factual background to the Award is set out in paras 3–10 of encl 2. In the arbitration, the respondent herein was the claimant contractor. The applicant here was the respondent in the arbitration and the employer. The award of the arbitrator, Mr Koh Beng Teck that is sought to be impugned is exh TVS-12 to encl 2 at pp 280–302.

[3] I have made observations in the case of *Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd* [2000] 1 MLJ 621 particularly at pp625H, 626A–I, 627AB and at p 626B–C, I set out the law in a nutshell as follows: **A**

> There is an 'error of law on the face of the award', if the arbitrator refers to evidence that is not legally admissible. It is an error if principles of construction not countenanced by the law are applied. There is also an 'error of law on the face of the award' if the arbitrator applies principles not permitted or recognized by the law. **B**

[4] With regard to the meaning of the expression 'on the face of the award' I went on to say that 'the expression "on the face of the award" should not be interpreted restrictively. ... In other words, if an award refers to a document or evidence as the basis for the decision, or the decision of the arbitrator can only be understood by reference to that document or evidence, then that document or evidence is deemed incorporated into the award and become available for review by the court.' (see p 626C, F–G). **C**

[5] For an understanding of what is meant by 'incorporation into an award', I have referred with approval (see p 626G) to the cases of *Chiam Tau Tze & Anor v The Sarawak Land Consolidation and Rehabilitation Authority and another case* [1994] 3 CLJ 605 and also the case of *Belsfield Court Construction Co Ltd v Pywell* [1970] 1 All ER 453. The said errors of law are described in detail in pp 5–16 of the motion at paras 1–5. In brief, these errors concern the following: **D** **E**

(i) the finding of the arbitrator that the determination of the contract by the applicant herein failed in both contract and in common law;

(ii) the use by the arbitrator of the method of 'averaging' to assess the cost of construction; **F**

(iii) the finding by the arbitrator that the applicant was not entitled to the balance of the discount of RM127,764.80;

(iv) with regard to the complaint in para 6 that the arbitrator had acted on no evidence whatsoever to support the finding that RM36,674.22, and it is noted that the applicant does not propose to maintain this complaint. **G**

[6] It is noted that the discussion by the arbitrator and his findings are set out in the part of his award under the title 'Determination contractual and common law' (see exh p 30 of encl 2). He sets out some facts at para 7 p 282 and para 8 p 283 of encl 2. On the question of contractual determination, **H** the arbitrator found that the determination foiled because it had not met the provisions and requirement (sic) of cl 25. He also says 'I am persuaded to this view because I agree with the claimant's arguments in its closing submission on this point'. These 'closing submissions by the claimant' are exhibited at exh TYS–8, pp 175–206. The relevant portion on this issue is at pp 198–207. The arbitrator does not give his reasons as to why and in **I** what respect the contractual determination by the applicant failed to meet the provisions and requirement (sic) of cl 25 of the contract. It is noted that

the closing submissions of the respondent at pp 198–207 on this point are the ones he agreed with. The relevant facts which are also undisputable are set out at para 6 onwards of encl 2. Paragraph 6 states that on 24 April 1998, the respondent issued a letter to the applicant entitled 'Temporary stop work' and suspended the work at the site (this letter is exhibited at p 49 of encl 2). They also wrote to the architect on the same day to inform that they would not attend the site meeting that day at 2.30pm (this letter is at p 51 of encl 2). By a letter dated 25 April 1998, the architect issued a default notice to the respondent warning them that the disputes over the certificate of payment, the lump sum contract and claims for variation order could not be taken as an excuse to stop work. The notice said that if they continued to stop work for 14 days from the date of his letter, their contract would be terminated and a third party employed. This notice is at p 52 of encl 2. It is not disputed that this default notice of 25 April 1998 was issued by the architect pursuant to cl 25(1) of the contract. It is also not disputed that this notice was faxed to the respondent on 25 April 1998 and delivered by hand to them on 27 April 1998 (para 6.2 of encl 2). The respondent continued to stop work despite the default notice by the architect and this continued for 26 days (see award at p 302 of encl 2) until 21 May 1998. Finally the applicant through its solicitors determined the contract with immediate effect by letter dated 21 May 1998. This letter was sent by fax and registered post (see p 65 of encl 2). In between the default notice sent by the architect (p 52 of encl 2) and the solicitor's termination letter dated 21 May 1998 (p 65 of encl 2), the applicant's solicitors also sent a letter on 5 May 1998 to the respondent (see p 57 of encl 2). This default notice also purports to give 14 days notice — however it is common ground that any notice validly invoking cl 25(1) of the contract must be issued by the architect as was the 25 April 1998 notice. In this respect, nothing material as far as legal consequences are concerned turns on this notice of 5 May 1998 sent by the solicitors of the applicant.

[7] As stated above, the arbitrator did not identify the provisions and requirement (sic) of cl 25 which were not met (see p 301 of encl). In the second paragraph under this head, the arbitrator says that he is not minded to adopt the 'business common sense approach'. He said, 'however, in this case, I am guided by and adopt the opinion given in Hudson para 12-004 on *Contractual Determination* 'exact and meticulous compliance by the determining authority with any formal or procedural requirements laid down in the termination clause, for example, as to notices or time limits will usually be required if a contractual termination is to be successful whereas the formal requirements for a successful common law determination are much more, based and require little more than a clear and unequivocal indication of his intentions by the determining party. These observations indicate that he has agreed with the main argument made by the respondent (at p 202, paras 63 and 64, and also p 245 of encl 2) that the default notice of 25 April 1998 was defective because it was not sent by registered post as required under cl 25 of the contract. This was notwithstanding the fact it is undisputed that the notice was delivered by hand. Clause 25 is set out at pp16–17 of exhibits to encl 2 in 'TYS-2'. I am of the opinion that in so finding,

the arbitrator misdirected himself in law and construed cl 25 on principles of law not countenanced by the law. He applied principles not permitted or recognized by the law as now developed and set out in a line of cases. This is most clearly demonstrated in the case that the arbitrator himself cited in this part of the Award — *Hill v London Borough of Camden* (1980) 18 BLR 35. I think the arbitrator's approach in law directly contradicted the decision in *Hill*. In the case of *Hill*, a UK Court of Appeal decision, the plaintiff contractor was not paid monies due under an architect's certificate. The contract there had the standard clause on determination by the contractor upon non-payment from 14 days from the date of the certificate if a notice is given and warns of determination if the default is carried on for a further seven days after receipt of such notice by registered post or recorded delivery. The same clause appears in cl 26 of our contract here and the same language is used in cl 25. In *Hill*, the default notice warning of 2 April 1979 was delivered by hand also by recorded delivery. The letter determining the contract was sent by recorded post and not by registered post as required under the contract. It was not disputed that the letter was in fact received by the employer. The employer argued that the letter failed to determine the contract as it did not comply with the contract. This is the identical argument here except that the difference here is, it is raised with regard to the notice of default and the notice was served by hand instead of by registered post. The Court of Appeal judges in fact endorsed the 'common sense' approach to the construction of the contract and rejected the 'exact and meticulous compliance with formal and procedural requirements' approach adopted by the arbitrator here. Lawton LJ said as follows at p 43:

> … Without going into the authorities, it suffices to say that, in general, if one party wishes to rescind a contract or to make an election under a contract, he must make his decision known to the other side. That is a general principle and one founded on common sense, but, of course, it must not be followed slavishly if the words of a particular contract, when properly construed in their context, point to a different conclusion.

[8] Then referring to cl 26, he said as follows at p 44:

> In my judgment, the important word in that provision is 'served'. 'Service' means that the notice has got to be given to the other party. It cannot be 'served' on the other party until the other party has received it; …

[9] Ormrod LJ said quite forcefully as follows at pp 47–48:

> All I will say about the Condition 26 point is this. … Nothing is more distasteful to me than to construe a business contract in this formalistic fashion. I think it makes a mockery of the law. To construe this contract and to treat what happened in this case between the contractors and the local authority in the way in which Mr May submits it should be treated is to make, I think, a farce of such contractual provisions. ....

[10] We pause here to point out that the argument by Mr May referred to by Ormrod LJ was that the service of the letter of termination was defective because it had been served by recorded post and not by registered post as provided under the contract. Ormrod LJ goes on to say as follows at p 48:

There can be no doubt here that it never occurred to any sensible person that there was any defect whatever in the operation of Condition 26. Everybody concerned knew perfectly well what was happening. No one was in the slightest degree prejudiced by it or pretend that they were prejudiced by it or it would be believed if they did. So that it is the most purely formal point.

When we come to look at the relevant provisions of Condition 26, the first point is Mr. Henderson's point about whether the provision relating to registered post or recorded delivery is to be regarded as mandatory or directory. I would be very much disposed to construe that part of the condition (may I say) sensibly and regard it as a directory provision only, but I can appreciate there may be some difficulties about it and I say no more about it.

…

In any event, therefore, I think, for these reasons and for the reasons given by my Lord, that that notice under Condition 26 was properly and validly given; consequently, that the plaintiffs had validly determined their employment.

[11] It is obvious that the arbitrator whilst whilst citing *Hill* for supporting his decision is going completely against it. I think to this extent, the arbitrator's reasoning is irrational and could be said to be perverse. If he had in fact applied the correct law as stated in *Hill*, the arbitrator would have found that the default notice of 25 April 1998 issued by the architect under cl 25 of the contract was in fact properly and validly given.

[12] The arbitrator adopted a particular sentence from Hudson on *Building and Engineering Contract* for his finding in law (see p 301 of encl 2). I think he has misconstrued this opinion. This sentence was in the discussion under the topic 'Contractual Determination'. Firstly, the arbitrator fails to have understood that this opinion is qualified by the words 'will usually be required'. Secondly, he ought to have appreciated that this was a mere observation and not to be treated as the law on the point. He ought to have appreciated that the actual law on the subject is to be found in the relevant case law. Observations of text book writers, authoritative as they are, are only law if they are adopted by judges who in the final analysis are the ones who decide and shape the common law. Thirdly, his reliance on this passing observation in Hudson at paragraph 12-004 was also misplaced and in error as he should read it in the context of the much more detailed views expressed in Hudson itself in the same edition further down at para 12-044 under the heading 'Formalities of Notice'. The said para 12-044 is a conclusion based on the earlier discussion starting at para 12-042 and says as follows:

The trend at the present day certainly seems to be to accept proved service by any means, and in the absence of express provision, requirements of form of this kind are regarded as 'directory' or 'facultative' as opposed to 'mandatory' or 'obligatory'.

[13] The same passage also says:

Proof of actual service, if relied on, will need to be made either to a stipulated address, even if by other than the stipulated means, or to a sufficiently responsible and duly authorized representative, it is submitted, and it goes without saying that the contents of the notice must show the invocation of the contractual remedy with no possibility of doubt, so as to distinguish the notice from the complaints of

default or warnings of possible future determination which can be commonplace in the correspondence between parties in construction contracts in situations where they have become at arm's length over substantive matters.

[14] It is observed that a perusal of the notice sent by the architect dated 25 April 1998 (see p 92 of encl 2) is extremely clear that if work continues to be stopped for 14 days from the date of the letter, the employer will determine the contract. I think the above passage from Hudson para 12-044 shows clearly how the arbitrator had completely misconstrued the legal position on the determination of the contract by the applicant's invocation of cl 25.

[15] It is noted that the arbitrator was fully advised in submissions of a line of cases right up to 1999 which have confirmed the common sense, business-like purposive approach which treat requirements of form as 'directory' or 'facultative'. However, he choose to ignore this clear line of authority. In so doing, he has clearly misconstrued and misapplied the relevant law here. The first case is the English case in 1945 of *Goodwin & Sons v Fawcett* (1945) Estates Gazette 186. Stephenson J decided that a notice determining the builder's employment was valid although it was sent to the builder by recorded delivery and not by registered post. He said he arrived at his decision 'in a common-sense business way as a building contract'. The Australian case of *Eriksson v Whalley* [(1971) 1 NSWLR 397] in 1971 took a different and strict approach and held that a default notice sent by the architect which was delivered by hand and not sent by registered post was not validly delivered. In 1975, in the case of *Carradine Properties Ltd v Aslam* [1976] 1 WLR 442, Goulding J in the Chancery Division on the question of whether a notice to quit by a landlord served on the tenant was valid or not because an incorrect date had been stated for determination of the lease took a purposive approach and asked the question 'Is the notice quite clear to a reasonable tenant reading it? Is it plain that he cannot be misled by it?'. Accordingly, he held the notice to be valid. The English Court of Appeal decision in 1976 of *Yates Building Co Ltd v Pulleyn & Sons (York) Ltd* 237 Estate Gazette 183 with regard to a notice sent to exercise an option to purchase took a purposive approach and rejected the argument that the notice was invalid because it had been sent by ordinary post instead of registered post. As the notice was in fact received within the required time, they held that the option was validly exercised. Then came the decision of *Hill v London Borough of Camden* in 1980. Here are the Court of Appeal's observations on the case of *Eriksson v Whalley* decided in Australia in 1971. As pointed out in the commentary at p 34 of the Building Law Reports, both members of the court did not find *Eriksson v Whalley* helpful. Ormrod J in fact echoed the words of Stephenson J, in *Goodwin v Fawcett* without specifically referring to the case. With regard to *Eriksson*, he said as follows at p 48:

In so far as the case of *Eriksson v Whalley* [1971] 1 NSWLR 397 is concerned, I would say no more than this. The point does not seem to have been argued before Collins J, and in that event all one can say is that Collins J followed the literal wording of the contract. We do not know, and cannot know, whether any of the points advanced by Mr Henderson in this court were put before him. It is plain that only two authorities were cited to him, neither of which seems to be particularly

relevant. So, for my part, with all respect to Collins J, I cannot regard the decision in *Eriksson v Whalley* is persuasive on anything and I do not find it helpful in deciding this case.

[16] The Singapore Court of Appeal decision of *Central Provident Fund Board v Ho Bock Kee* [1981] 2 MLJ 162 was then decided in 1981. The question there, inter alia, was whether a default notice issued by the Superintending Officer which was sent by hand instead of registered post as required under the contract was validly sent. A second question was also whether the default notice itself was invalid on account of it being signed by the Superintending Officer — this question was raised on the basis that although the default clause provided for the Superintending Officer to send the notice, another overriding clause of the Contract provided that the right to take action under the default clause was reserved to the Chairman of the Central Provident Fund Board. The court held that the notice was invalid on both questions. I think this decision is clearly correct in respect of the invalidity of the notice on account of it being signed by the Superintending Officer as this is a substantive defect. With regard to the question of the mode of delivery, the court was referred to *Goodwin v Fawcett*, *Eriksson v Whalley* and *Yates Building Co v Pulleyn.* They unfortunately had not referred to the English Court of Appeal decision of *Hill v London Borough of Camden* which had disapproved of *Eriksson v Whalley*. As the editors of Building Law Reports comment in their commentary at p 34:

> It now seems that the Singapore Court was not referred to *Hill v London Borough of Camden*, and indeed we were not aware of the latter decision when the commentary to the *Central Provident Fund Board* case was written.

[17] The *Central Provident Fund* case is quite distinguishable on its fact as the court's approach there might have been influenced by the fact that the notice suffered a serious and substantive defect that it was signed by a person who had no right to do so under the contract.

[18] The next developments are two House of Lords decisions in 1984 and 1985, the cases of *Miramar Maritime Corp v Holborn Oil Trading Ltd* [1984] All ER 326 and *Antaios Compania Naviera SA v Salem Rederierna AB* [1985] AC 191. These cases reject the literalist approach and affirm a business common sense approach. See observations of Lord Diplock in *Miramar* at pp 682 EF and 686 AC. He reiterates this emphatically in *Antaios* (see p 201 DE) where he states:

> ... I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract are going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

[19] The Court of Appeal in UK in 1989 in the case of *Delta Vale Properties Ltd v Mills & Others* [1990] 1 WLR 445 reaffirmed the Carradine Properties stated above 'Is the notice quite clear to a reasonable tenant reading it? It is plain that he cannot be misled by it? (pp 454CD, 455H). In 1989, we also have the Supreme Court of New South Wales now following the business commonsense trend in the case of *Kennedy v Collings Construction Company* [1997] 7 B & CL 25. This case concerned a notice of determination of the

contract which was sent by ordinary post although the contract provided for registered mail in cl 13. There was no dispute that the notice had been received by the contractor. There was also another clause (cl 25) which provided that any notice was deemed to be given if sent by prepaid post to the address in the contract. Giles J followed the approach set out in the English Court of Appeal case of *Yates Building Co* and also cited several other Australian decisions which had held that a contractual provision for service of a notice by registered mail has been held to stipulate a permissible, rather than obligatory, means of giving notice. He declined to follow Eriksson v Whalley and also distinguished it. He placed emphasis on the fact that there was also a general provision ie cl 25 on service of notices by pre-paid mail. Reference is made to the recent House of Lords decisions in 1997 and 1998 in the cases of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] All ER 98. In Mannai Investment, the House of Lords in a majority decision dealt with the question of the validity of notices to quit by a landlord to a tenant. The notices contained a mistake as to the date of determination. The House of Lords held the notices to be valid. They affirmed the commonsense purpose approach of *Carradine Properties.* In *Investors Compensation Scheme Ltd* the business commonsense approach of *Mannai Investment* and *Antaios* was again affirmed. A recent 1999 UK High Court case *Ellis Tylin Ltd (known as Dalkia Technical Services Ltd) v Co-operative Retail Services Ltd* (1999) BLR 205 involving a maintenance and repair applies the approach set out in the above House of Lords' decisions with regard to a notice of termination. Here the issue was whether the notice of termination was invalid because it was given fractionally early compared to the contractual provision. In the words of the editors of the Building Law Reports (see p 206), 'The [High Court] analyzed many of the authorities … . … the judge's approach was based upon a commercial approach.'. The said editors conclude as follows:

> It follows that by reference to the standard form construction contract, this approach should be adopted. There should now be little doubt that formal requirements for methods of serving notice (such as by recorded delivery) may be considered to be simply formal. The commercial purposes of such clauses, particularly the requirements for service of a notice, must be to provide some demonstrable certainty that the notice has been served. If it can be shown that the notice was served in time on the other party, it is likely therefore that the notice of determination will be considered to be properly served even though the formal requirement for registered post or recorded delivery has not been followed.

[20] I would adopt the above observations as a correct statement of the law as it currently stands with regard to the contractual formalities required by notices. Two Malaysian High Court decisions have taken different approaches on this question. The case of *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80 decided in March 1998 by Nik Hashim J (as he was then) followed *Eriksson v Whalley* and *Central Provident Fund v Ho Bock Kee.* He was referred to *Kennedy v Collings Construction Company* and discusses it at p 85F–H. Giles J who decided *Kennedy* is referred to as Cole J in error. Nik Hashim J (as he was then) does not seem to have been referred to the entire line of cases cited above. He says as follows:

> There seems to be no decided case binding on this court on this issue. (This would appear to be correct as there was, and still is no local appellate level case on point.) The cases from other jurisdictions appear to conflict with each other. The English cases suggest that provisions on the mode of service are merely directory while the Australian and Singapore cases suggest that such provisions are mandatory and therefore obligatory.

[21] It is observed here that the Australian cases had in fact with the decision of *Kennedy* and the other Australian cases cited therein already followed the directory approach. Hence it would be incorrect to say that 'the Australian cases suggest that such provisions are mandatory'. *Central Provident Fund* would be the only Singapore case he could have in mind, although 'cases' are mentioned, but again it is observed that *Hill v London Borough of Camden* just decided then by the English Court of Appeal disapproving *Eriksson v Whalle*y was not cited to the Singapore Court. I think Fajar Menyensing was therefore decided per in curiam and ought not to be followed. The approach taken there is not in line with all the latest cases in the UK and Australia with very similar contractual documents. Nik Hashim J (as he was then) was insistent on a literal and formal construction of the service requirements provided in cl 25 of the contract. He was also prepared to disregard the words 'recorded delivery' in the clause on the basis recorded delivery did not exist in Malaysia. However, this would contradict with the literal approach that he had adopted. Nik Hashim J (as he was then) cited Prof Vincent Powell-Smith in his book *The Malaysian Standard Form of Building Contracts* with approval for the view:

> Although there are English decisions which suggest that the contract provisions about the mode of service are merely directory and not mandatory as the words suggest ... the contrary view has been taken in New South Wales and in Singapore and is to be preferred.

[22] I think the statement that 'the contrary view has been taken in New South Wales', is a reference to the 1971 decision of *Eriksson v Whalley* which would not be entirely a correct description of the law in New South Wales bearing in mind the 1989 decision of *Kennedy* (a decision of the Supreme Court of New South Wales) unless the said textbook writer was not aware of the 1989 decision. For these reasons, I think *Fajar Menyensing* would be an appropriate decision to follow. The second Malaysian decision on this issue is the case of *DMCD Museum Associates Sdn Bhd v Shademaker (M) Sdn Bhd (2)* [1999] 4 MLJ 243, a decision of Kamalanathan Ratnam J which dealt with a building contract. A preliminary issue was raised with regard to the validity of the notice of determination which was sent 'by hand'. The learned judge distinguished *Fajar Menyensing* and relied on the general clause in the contract on service of notices to hold that the service by hand was valid service. The learned judge does not appear to have been referred to the line of authorities cited above apart from and purposive approach in the UK and Australian cases. *Fajar Menyensing*. However, he has clearly and correctly taken the business commonsense It is noted that cl 2(4) of the contract here (see p 9 of encl 2) is quite similar to the cl 32 referred to in *DMCD Museum Associates*. Clause 2(4) reads as follows:

(4) The Contractor shall upon signing notify the Architect in writing of an address where notices and Architect's instructions under this Contract may be served upon him. In the event of the Contractor failing to notify the Architect of such an address or failing to notify the Architect of any change in such address, notices and Architect's instructions shall be deemed served upon the Contractor if sent by registered post to his address stated in the contract, or if left at his office on the site and a receipt is obtained from the contractor's foreman-in-charge.

[23] The words of this clause would support the business cornmonsense approach that the key issue between the parties is that notices are in fact served. The key issue is not how the notices are served as long as they are served. To conclude on this point, I am of the view that the arbitrator fell into a clear error when he ignored the entire line of cases set out above and the clear trend of the current day to take a business commonsense approach. He fell into error when he rejected summarily as he did (as p 301) the request to take such an approach. He followed the wrong law in taking a formalistic and mandatory approach to the procedural requirements of sending notices under the contract. The arbitrator was therefore wrong in concluding that the contractual determination by the applicant of the contract failed.

[24] Again as I have said earlier that the arbitrator did not spell out in what manner the applicant failed to meet the provisions and requirement (sic) of cl 25. He merely said 'I am persuaded to this view because I agree with the claimant's arguments in its closing submissions on this point'. I have dealt with the above what I believe was the main argument raised by the respondent ie that the default notice was bad because it was delivered by hand and not by registered post. The respondent makes lengthy arguments focusing on the notice sent by the solicitors on 5 May 1998 to say that this notice is not valid as a default notice under cl 25 (see paras 58, 59, 60 and 61 at pp 199–201 of encl 2). This is a complete red herring. The respondent knows that a default notice to be valid under cl 25 must be sent by the architect and by no one else. With regard to the 27 April 1998 default notice sent by the architect, the respondent also argued (see para 63(c) of p 203 and para 3 (a) of p 244 of encl 2) that the notice is not valid because it did not specify the default. This argument can be dismissed for being baseless by simply reading the notice which is set out at p 52 and reads as follows:

Re: Temporary stop work

We refer to the above, and your letter to SK Styrofoam (M) Sdn Bhd [Ref: PLCL/SKS/98046/MAR/nr] dated 24 April 1998, please be informed that dispute over the certificate of payment, the lump sum contract and VO claims shall not be taken as an excuse for stopping on site.

If you continue to stop work for fourteen (14) days from the date of this letter, we will terminate your contract and engage a third party to carry out all the outstanding works (specified in the contract), and all extra cost incur shall be borne by Pembinaan LCL Sdn Bhd.

[25] I think this letter can hardly be clearer with regard to the alleged default that work was stopped. The writer spelt out the default and the clear consequences if the default continued for 14 days. In the respondent's closing submissions, the respondent in paras 60–70 (pp 200–206 of encl 2)

also attacked the notice of determination dated 21 May 1998 as defective and invalid. The respondent argues that it relied on an invalid notice of default dated 5 May 1998 and also specified defaults of notice of which notice had not been given or which were not permitted within cl 25 and finally that it was served out of time and should have been issued on or before 19 May 1998. The scheme of things under cl 25 is quite clear. A default notice is issued by the architect. This notice is the critical condition precedent for a subsequent act of determination. It must set out one of the four kinds of defaults set out under cl 25(1). It must be delivered to the contractor. It must warn clearly that if the said default is carried on for 14 days, then the employer will invoke the right to determine the contract. It cannot be ambiguous on this. As pointed out in Hudson at para 12-042 set out above says, it is critical for the validity of the notice that it states that the contract will be determined without any doubt so as not to be confused with warnings of possible determination. I think as long as this is clear from the face of the notice, the notice is valid. As far as the letter of determination is concerned, pursuant to cl 25, I think that all a valid notice of determination has to do is to do precisely that — ie it will state clearly that the contract has been determined. For legal validity, it does not even have to state the reason because that has already been stated in the most important condition precedent — the default notice. In other words it needs to state nothing more or nothing less. However, the fact that the determining notice besides stating the fact of determination makes reference to the reason, or other reasons or makes references to other notices cannot logically affect its validity. This would be because all that is required under cl 25 is an unequivocal communication of determination. Applying the above to the default notice dated 25 April 1998, it clearly says that, '... dispute over the certificate of payment, the lump sum contract and VO claims shall not be taken as an excuse for stopping on site'. It goes on to warn as follows, 'If you continue to stop work for fourteen (14) days from the date of this letter, we will terminate your contract and engage a third party to carry out all the outstanding works ...'. Applying the principle in *Carradine v Properties* 'Is the notice quite clear to a reasonable person reading it? Is it plain that he cannot be misled by it?', there is no question that the default notice had complied with the requirements of cl 25. The contractor knew clearly what was the default and the consequences of continuation for 14 days. As far as the letter of determination is concerned (which is p 65 of encl 2), in the last paragraph, it clearly communicated the fact that the employer has determined the contract. The letter also says as follows:

(a) You have since 24 April 1998 without reasonable cause wholly suspended the carrying out of the works of the aforesaid project or failed to proceed regularly and diligently with the works of the aforesaid project;

(b) You have failed to comply with the notices of the Architect to rectify the defective works of the aforesaid project as at the said date.

[26] The fact that the letter contains references to other letters and mentions the continuation of the default for 14 days and/or other defaults of the contractor (all of which it did not have to do) in no way detracts from its validity as a determining notice. The letter read with or without those other

references to defaults is valid as a determining notice because it contains the key elements set out above, ie the fact of an unequivocal determination of the contract. Clause 25 is quite clear — only the default notice has to specify the alleged default. The determining notice does not have to. Clause 25 also mentions that the determining notice must not be given unreasonable or vexatiously. A contractor challenging the notice could of course allege and attempt to prove unreasonableness or vexatiousness. However, as far as the contents of the notice are concerned, the notice certainly does not have to contain a statement such as 'this notice is not given unreasonably or vexatiously'. Again applying the *Carradine Properties* principle, it is clear that the notice of determination would be quite clear to the respondent as a reasonable contractor having received the earlier default notice of 25 April 1998 and it is plain that he cannot be misled by its contents. It is plain that the reasonable recipient would know that the contract had now been terminated. If the question had troubled him as to why the contract had been terminated, reference to the earlier notice of 25 April 1998 would answer the question. As argued above, the fact that the determining notice makes reference to the default being carried on since 27 April 1998 or to other defaults cannot confuse him as to the fact of communication to him of the determination of the contract, which is all the notice is required to do. The submission of the respondent (in para 63) that the letter of determination was issued out of time is equally baseless. The argument appears to be made as follows. The default notice was faxed on 25 April 1998 and delivered by hand. The notice of determination was dated 21 May 1998 and delivered outside the period of 10 days allowed under cl 21. The respondent clearly misconstrued how cl 25 works. It is undisputed that the respondent stopped work from 24 April 1998 right up to the determination of the contract up to 21 May 1998. If one assumes however for the sake of argument, that the respondent had in fact resumed work on 10 May 1998, only then would they have a basis to say that the notice of 21 May 1998 was issued too late since cl 25 provides that the employer ... may within ten days after such continuance or repetition ... determine the employment of the contractor ... . The key word here is 'continuance'. The default here of stopping work on 24 April 1998 is not and cannot be treated as a momentary default limited to that day. It continued right up to 21 May 1998. There is no question that the notice was within time. In fact even if the respondent resumed work on 21 May 1998 itself, the applicant could have still resorted to use cl 25 to determine the contract so long as they exercised it within the next ten days up to 31 May 1998. I am of the view that the arbitrator by adopting the misconceived and erroneous legal positions of the respondent as his reasons has therefore committed errors of law on the face of the record in his finding that the determination by the applicant by invoking cl 25 of the contract has failed.

[27] It is common ground that even if determination of the contract through the contractual provisions fails, that a common law right of determination is still available to the applicant. This is so because the courts have consistently held that common law rights can only be excluded by express terms to that effect. See the cases of:

(i) *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* 1 BLR 73;

(ii) *Fairclough Building Ltd v Vale of Belvoir Superstore Ltd* (1980) 28 CLR 1; 56 BLR 74

(iii) *London Borough of Merton v Leach Ltd* (1982) 32 BLR 51;

(iv) *Architectural Installation Services v James Gibbons Windows Ltd* (1989) 46 BLR 91.

[28] In any event, cl 25 is also qualified by the words 'without prejudice to any other rights or remedies' which clearly indicates a preservation of all common law rights of contractual termination. In the arbitration, the applicant (respondent there) had argued that on the facts, the determination of the contract by the letter of 21 May 1998 sent by the applicant's solicitors operated as a valid rescission of the contract in common law (see pp 132–141, 228–231 and 269–272 of encl 2). The respondent's arguments are in para 72 at p 206 and also at pp 246-250. In his award, (see pp 301–302 of encl 2), under the heading 'Common Law', the arbitrator first sets out a passage from Hudson para 12-03 which in essence says that to justify a determination in law, the determining party must show either intrinsically or on the particular facts a sufficiently fundamental breach of contract. He then sets out his finding that the applicant can rely only on the matter of 'temporary stop work' as the other reasons mentioned are invalid because 'failure to rectify defective work' is not a permissible reason, while 'failure to proceed regularly and diligently with the works' is not proven or previously mentioned. I think this statement contains some misconceptions of what the law is and what is required of the arbitrator. First, he was wrong in law in concluding right at the outset that 'failure to rectify work' is not a permissible reason in law to justify rescission of a contract by an employer. Hudson at para 4-210 says as follows:

> Equally, an unjustified and continued failure to remedy defective work which justifies removal or repair before further work should reasonably take place will also be a breach of a fundamental implied term, it is submitted — no owner can be expected to watch helplessly while defective permanent work is built into his land and covered up, with later reinstatement at reasonable cost or without serious delay progressively less likely.

[29] In *Sundra Rajoo on the Malaysian Standard Form of Building Contract (The PAM 1998 Form)* (2nd Ed 1999), on the aspect of failure to remove defective work as a default under cl 25(1)(iii), the writer also contemplates that such a default may allow determination under common law albeit he does indicate that it may not be easy to justify. Nowhere in the authorities or in the textbook commentaries does one find the position taken by the arbitrator that failure to remove defective work is not a permissible reason for a common law determination. In misconstruing the law in this way, the arbitrator has therefore put himself in the position that he refuses to entertain the rival contentions of each party on this question, refuses to analyze the evidence and make a finding as to whether as a matter of fact and law, that the contention of the applicant that the respondent failed to

remove defective work to the extent it became a sufficiently fundamental breach of contract was made out or not. He has clearly misconducted the proceedings in this sense and has failed to discharge his duty as an arbitrator ie to deal with and decide the question posed to him according to the law. The arbitrator also observed that 'failure to proceed regularly and diligently with the works is not proven or previously mentioned. The arbitrator then went on to set out the relevant wording in cl 25(1)(a). He appeared to recognize correctly that the contents of cl 25 had relevance for deciding whether a sufficiently fundamental breach had been committed. He then set out the fact of the letter from the respondent contractor to the applicant employer dated 24 April 1998 confirming the fact of 'temporary stop work'. Next he said, 'I now examine the consequences of "temporary stop work" to see what harm, if any, and to what extent it has caused to the respondent' (applicant herein). I think he posed an erroneous question to himself. He then sets out some evidence (see p 302 at the top). He then says as follows in terms of his reasoning:

> Although these scenario (sic) are merely speculative, the consideration of what might have been can help us to answer what actually happened. The crucial question now is what harm to the contract or to the employer did this 'temporary stop work' cause? I find the answer to be the possible or potential delay in the completion of the project. How much of a delay? Depending on the manner and speed with which the unresolved matters (sic) are handled it would be one week or one month or no delay in the final analysis.

[30] Here again, I think that he has misconstrued the law and has posed the same wrong question again to himself. What are the undisputed facts as accepted by the arbitrator himself? First, that the respondent stopped work from 24 April 1998 right up to the determination of the contract on 21 May 1998, a period of 26 days. The arbitrator had also held (see p 83 of encl 2) that the respondent had made an offer for reasonable completion of the contract by 30 March 1998. The arbitrator also accepts from his rendering of the facts that there was a default notice dated 25 April 1998 from the architect warning of termination but of course does not accept its validity pursuant to cl 25. It is also undisputed that there was another notice on 5May 1998 (after 12 days of continued stoppage of work) again warning of intent to determine if the stoppage continued. It is trite that stoppage of work has no question of 'degrees' of stoppage. One has either stopped work or one is doing some work. The words of cl 25(1)(a) of the contract spelling out the default of 'without reasonable cause wholly suspends the carrying out of the works before completion hereof' clearly show the kind of event that both parties have in contemplation as sufficiently serious to validate determination of the contract just by being carried on for 14 days. The arbitrator correctly accepts the contents of this phrase as relevant to the question of the common law determination. The question now arises — is a contractor who 'temporary stop(s) work' doing the equivalent of 'wholly suspends work'? It cannot be otherwise. As Mr Sundra Rajoo points out, 'Suspension does not imply that the contractor must have left the site but merely that no work is being carried out'. The respondent has submitted before the arbitrator that they only temporarily stopped work therefore they

did not wholly suspend work. Does this mean that they have to say that they are permanently stopping work before it can be regarded as wholly suspending work? I think putting the question this way exposes the complete lack of merit in their position. We all know what permanently stopping work means. In the same way it is eminently clear what temporary stopping of work is. The proper questions in law that the arbitrator should have addressed to himself is therefore:

> On the facts of the case, had the Respondent wholly suspended work? If so, was it done because of physical impossibility and hindrance? Bearing in mind the time periods in the contemplation of the parties in cl 25 for continuation of a default that then permitted determination, did this suspension of the work carry on for a time that made it a sufficiently fundamental breach?

[31] The arbitrator never asked these questions. By putting the question as he has done ie by asking to examine the consequences to see what harm, if any, and to what extent the 'temporary stop work' has done, the arbitrator has, perhaps without being quite aware of it, actually recognized a right on the part of the contractor to suspend work. What he is effectively saying is that a contractor has a right in common law to suspend work so long as the damage is not sufficiently serious to become a fundamental breach. I think that such a recognition of such right goes against all known principles of construction law. The law on suspension is conveniently and clearly set out at para 4-223 of Hudson at pp 623–624. I adopt the entire paragraph here. The passage sets out the law as described in the case of *Canterbury Pipe Lines v Christchurch Drainage* [1979] 16 BLR 76, a decision of the New Zealand Court of Appeal which says, inter alia, as follows (see p 90 of the judgment):

> The *Mersey Steel* decision goes far to explain the apparent absence in English building contract law of any recognition of a common law right to suspend work for wrongful withholding of a progress certificate or payment, as distinct from a right to rescind for a breach going to the root of the contract. ... Apart from suing for interim payments, or requiring arbitration where that is provided for, the remedy — and apparently the only remedy — which the contractor is recognised as having at common law is rescission of a sufficiently serious breach has occurred. If he chooses not to rescind, his own obligations continue. He is bound to go on with the work. All the available English and Commonwealth textbooks on building contracts state the law consistently with this view.

[32] On the same page, the court also indicates that the limited category of circumstances where a party may be exonerated from performance is when his performance is stopped by physical impossibility or hindrance. The arbitrator had never at any time addressed the question to himself as to whether the aespondent was justified in stopping work because of a physical impossibility to do the work or a hindrance. The case of *Lubenham Fidelities & Investment Co Ltd v South Pembrokeshire District Council & Wigley Fox Partnership* 33 BLR 39, an English Court of Appeal case confirms this legal position. At home, we have the High Court decision of *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1997] 1 CLJ 448 which adopts andfollows *Lubenham* and the observations on this issue in Hudson's at para 4-223, where it is stated that a contractor's response to actual or

alleged breaches of contract by the owners by suspending or deliberately going slow are extremely perilous.

[33] On the facts of the case here I am talking about a suspension and not a 'going slow' situation. Low Hop Bing J said categorically (see p 458 of the judgement) that, 'There is no intermediate right in a building contract to suspend works. If the contractor insists on the continued performance of the contract, ie he affirms the contract, he must himself continue to perform his primary obligations under the contract ie continue performing the contract works. That is why suspension of the works by the contract, ie not continuing with his primary obligations, becomes itself a repudiatory breach by the contractor'.

[34] I come to the conclusion that based on the principles of construction law set out above, it is clear that the arbitrator had asked himself the wrong questions and in doing so committed fundamental errors of law on the face of the record. I am of the view that the correct question that ought to have been posed and answered by the arbitrator, ie 'On the facts of the case, had the respondent wholly suspended work? If so, was it done because of physical impossibility or a hindrance to doing work? Bearing in mind the time periods in the contemplation of the parties in cl 25 for continuation of a default that then permitted determination, did this suspension of work carry on for a time that made it a sufficiently fundamental breach?' Can the undisputed facts be answered here? Work was stopped for 26 days. The respondent has not shown any evidence of a physical impossibility or hindrance to justify their suspension. The contract itself contemplated that the employer could determine the contract for a suspension of work without reasonable cause that continued for just 14 days after a warning. I think such a conduct therefore clearly was a breach that was sufficiently fundamental to justify the determination of the contract in common law. The determination of the contract by the applicant was valid in both contract and in common law and therefore the determination by the arbitrator that the determination foiled is hereby set aside, ie an order in terms of prayer 1(a) and (b) of the motion and I also grant the consequential orders set out in prayers 2,3 and 4.

[35] Paragraph 4 of the motion has reference at pp 13–14 where it sets out the applicant's grounds and also pp 290–292 of encl 2 where the relevant portion of the Award is. Paragraph 13 of encl 2 sets out the undisputed facts relevant to this issue which are set out at p 7. The arbitrator at p 290 accepted that there were three versions of calculations of the cost of construction viz the respondent's, the applicant's (through the architect) and that is prepared by Mega QS. The arbitrator knew from the submissions of both parties that it was common ground that Mega QS was in fact engaged by the respondent as professional quantity surveyors to prepare the revised bill of quantities and that this was done with the consent of the qpplicant and the qrchitect. The qrbitrator committed an error of law on the face of the record by arbitrarily choosing a method of arbitrary guesswork in using the 'method of averaging' to obtain a 'reasonable' on (sic) probable cost of construction. He had as the correct option quantities measured by an independent professional accepted by both the parties. In using the method of averaging,

he was actually allowing the respondent to dispute the bills of quantities measured by the quantity surveyor they had themselves appointed and which decision was therefore arbitrary, unfair and unreasonable and amounted to an error of law on the face of the record. For these reasons I grant an order in terms of 1(d) of the motion and the consequential order at prayer 5 as well.

[36] The applicant in its counterclaim (see p 101 of encl 2) had claimed payment of an agreed discount of RM127,764,80. The arbitrator made a finding (in para 11, see p 284 of encl 2) that 'The respondent (applicant herein) is not entitled to any further part of the discount (of RM127,764.80) given by the claimant on its tender sum and for the reasons given'. The facts as found by the arbitrator are set out at p 295 of encl 2. The key sentence is as follows: The claimant's (respondent herein) tender price for the project was RM3,827,764.80; and a lump sum discount of Ringgit Malaysia was given and the contract was awarded at the price of RM3,700,000. This is also clear and undisputable based on the contract documents (see p 48 of encl 2). The arbitrator then went on to say that 'From Interim Certificates No l to No 5 an amount totalling RM56,759.41 was deducted (this was the pro-rata discount based on value of work done)'. He concludes in respect of the claim made by the applicant for balance of the discount, I further find that the respondent (applicant herein) is not entitled to any further discount from this discount; specifically from Interim Certificates No 6 to No 12. It would appear that the purported basis of his finding in his earlier sentence, 'From Interim Certificates No 6 to No 12 no such deductions were made and the respondent did not at any time claim or demand for any of them'. It is here that I think that the arbitrator has made a clear error of law on the face of the record. I am not dealing here with a situation of an arbitrator making a mere error of law by drawing a wrong inference of fact, say from other facts or by making factual conclusions which are not based on sufficient or any evidence or from wrongly admitted evidence. I am dealing here with a situation where the arbitrator has completely misunderstood the necessary conditions how an express right to payment provided in the contract is to be varied in a manner to extinguish that right. It is trite that when there is express agreement in writing with regard to payment of a discount of a certain amount, the beneficiary of that promise cannot be denied the payment without an express waiver of the benefit of the payment. The effect of the arbitrator's finding is to rewrite the contract on the mere basis that the discount was not mentioned in the Interim Certificates No 6 to No 12. The arbitrator's view of the Interim Certificates is also contrary to established principles countenanced by the law, the PAM Form and architectural practice (see *Gasing Heights*). It is trite in construction law that it is only the final certificate that decides the amount of money finally due. As commentator Mr Sundra Rajoo points out in his book at p 300, 'No Interim Certificate is final and conclusive and is always subject to review in the Final Certificate'. Hence only the contents of the Final Certificate if for example the applicant had not claimed the balance discount there, could as a matter of law, in the absence of any express written waiver, be taken as a basis of waiver of rights. Here it is common ground that there was no Final Certificate. There had to be express waiver or an express variation of the contract for

the arbitrator to properly make the legal finding that he had done with regard to the entitlement of the applicant for the discount. I view the arbitrator's finding is an error of law on the face of the record and should be set aside as prayed for in prayer 1(c). I therefore grant an order in terms of prayer 6 of the motion as amended to state the balance amount of the discount of RM71,005.39 for completeness. I also grant an order in terms of prayers 8 and 9 of the motion.

Application allowed with costs.

Reported by Eugene Jayaraj